THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH by CVP**

BEFORE: **EMPLOYMENT JUDGE TRUSCOTT QC**

BETWEEN:

Mrs A Clark **Claimant**

AND

Arnold Burgess Partnership Limited **Respondent**

ON: **3 February 2022**

Appearances:

For the Claimant: **Ms G Razaie of Counsel For the Respondent:** **Mr A Francis of Counsel**

JUDGMENT

1. The claim of wrongful dismissal is well founded. The claimant is awarded £3128.79 in damages.

2. The claim of unfair dismissal brought under Part X of the Employment Rights Act 1996 is not well founded and is dismissed.

3. The claim of failure to provide a written statement of her particulars of employment contrary to section 1 of the Employment Rights Act 1996 is dismissed on withdrawal.

4. The claim for an order for payment of pension contributions is dismissed on withdrawal.

REASONS

PRELIMINARY

1. On 3 February 2021, the claimant presented her claims of unfair dismissal, wrongful dismissal, for payment of pension contributions and a failure to provide statement of terms of employment. Her claim for a failure to provide a written statement of her particulars of employment, contrary to section1 of the Employment Rights Act 1996, was withdrawn at the hearing. Her claim concerning pension contributions was withdrawn some time ago but had not been dismissed.

2. The claimant was represented by Ms G Rezaie, barrister, who led the evidence of Mrs Clark. The respondent was represented by Mr A Francis, barrister, who led the evidence of Mr A Burgess, the principal of the respondent.

3. There was a bundle of documents to which reference will be made where necessary. The numbering in the judgment refers to the pages in the electronic bundle. The respondent added pages 128 and 129 to the bundle.

FINDINGS OF FACT

1. The claimant was first employed by the respondent on 15 April 1996. She was employed as a secretary. Her role comprised typing, preparing spreadsheets, monitoring incoming emails and answering the phone. Typing was the main component of this role, in particular, the clamant would type out emails, invoices and occasionally structural reports for Mr Burgess. Mr Burgess sought, where possible, to have the claimant do his typing for him, because she was much quicker than him. All incoming and outbound emails from the respondent were received on and sent only from the claimant's computer. When the claimant was in work, she was responsible for monitoring and sending such emails. When she was not, Mr Burgess covered that aspect of her role. She was dismissed by reason of redundancy on 19 September 2020.

2. The respondent is a small business that operates in the construction industry. Immediately prior to the claimant's dismissal, it had four employees. Those were:

a. Andrew Burgess, a chartered Civil Engineer and the CEO.
b. Adam Gray, an AutoCAD Draftsman (i.e. someone who uses Computer Assisted Design software to create technical drawings and plans). c. The claimant, who was employed as secretary.
d. Claire Perkins, who was employed as the office clerk (and later office manager).

3. Prior to the Covid-19 pandemic, the respondent's business practices were that Mr Burgess and Mr Gray were (and still are) engaged with the technical side of the

business. This involved delivering design work to the construction industry, primarily in the fields of demolition, listed façade retention, deep basements and foundations. Mr Burgess spent his time in the office and on client sites. Mr Gray worked mostly in the office. The claimant was the secretary. Ms Perkins was the office clerk, having joined the respondent in April 2019. Ms Perkin's principal role was to convert Mr Burgess' and Mr Gray's hand-written daily diary entries into monthly typed schedules, showing the work done on each project, which could then be converted into invoices by Mr Burgess. The respondent often worked on 20 or more different projects each month. She was also responsible for processing expenses, filing, office supplies, health and safety and keeping the office tidy. Her computer was not connected to the respondent's emails, nor was she asked to undertake typing. Ms Perkins was not able to perform typing work anywhere near the standard of the claimant because she had never learned to touch type, was not familiar with the construction industry and its jargon, nor was she familiar with the respondent's house style for emails.

4. Ms Perkins worked mornings (9.15am to 1.45pm) and the claimant afternoons (1pm to 6pm).

5. The first period of national lockdown because of the Covid-19 pandemic began on 23 March 2020. Like many businesses the respondent was forced to evaluate and adapt its working practices.

6. Home working was not practical for the claimant as she had no remote access to the respondent's computer system/software. With the claimant's consent she was placed on the government furlough scheme [51 and 57].

7. Due to the pandemic, there was a downturn in the construction industry, the respondent changed the way that it worked. Mr Burgess was working remotely from home most of the time and was doing far less travel, he was using Zoom and Microsoft Teams instead of attending site meetings. He was doing his own typing which he then sent to Ms Perkins, who was working from the office, who would copy and paste the typing into an email, in order to send it from the office "email computer" (the claimant's computer). Ms Perkins would only switch to the claimant's desk when Mr Burgess telephoned the office and notified them that there was an outgoing email to cut and paste which he had prepared.

8. Mr Burgess realised that the respondent could manage without a secretary. He wrote to the claimant on 1 June 2020 warning her that she was at risk of redundancy [68-70]. He explained that no decision had been made yet, that there would be a consultation process and that the respondent would look at ways to avoid making her redundant. He invited her to a consultation meeting, either in person or by telephone. He explained that the respondent envisaged that the consultation period would end on 19 June 2021 unless further time was granted. He then explained that if the claimant was dismissed by reason of redundancy, her dismissal would be effective on 19 September 2020. He provided a lengthy background on 2 June 2020 [70-76].

9. The claimant responded by email on 8 June 2020 by asking Mr Burgess for his proposals in writing [70]. He replied by emailing the claimant [69] noting that: a. Times were hard and the respondent was in "survival mode";

b. There did not appear to be enough secretarial work to keep the claimant busy between 1pm and 6pm, 5 days per week;
c. shorter hours might be an option, subject to the claimant accepting a smaller pay cheque; and
d. Were redundancy to be the final outcome, the claimant would be entitled to redundancy pay.

10. Mr Burgess made a number of requests to meet the claimant or to speak to her on the phone [68, 69, 70 and 76]. However, the claimant did not engage with him. On 15 June 2020, Mr Burgess wrote to the claimant again [77] suggesting ways that redundancy could be avoided. In particular he suggested that the claimant could return on shorter hours, between 2pm and 4.30pm, with her salary adjusted accordingly. He reminded the claimant that if she were to be dismissed by reason of redundancy, her employment would be terminated on 19 September 2021. He again suggested that they discuss the matter.

11. The claimant replied by email on 15 June 2020 [81-83]. In that email, amongst other things, the claimant: a) said that her role was the same as Ms Perkins; b) said that it would be "grossly unfair" if she were to work shorter hours and take a pay cut; and c) complained that the redundancy pool should include all employees performing the role that is to be made redundant. She concluded her email "I would prefer to keep everything in writing please".

12. Mr Burgess responded on 16 June 2020 [85-87]. He explained that Ms Perkin's role was different to the claimant's role and that the Covid-19 pandemic had demonstrated that the respondent could function without the claimant's secretarial support.

13. On 17 June, the claimant replied by email [87-89]. The matters raised by her were essentially the same as those raised on her email of 15 June 2020. She continued to say that the decision to make her redundant was "unfair" and "discriminatory". She concluded "I consider the working relationship between us to have broken down making it impossible for me to return to the office in any role".

14. The period of consultation came to an end on 19 June 2020. It had not resulted in any alternative to redundancy. The claimant was dismissed on 19 September 2020 [94].

15. Since the claimant's dismissal the respondent has consisted only of Mr Burgess, Mr Gray and Ms Perkins. No-one has been hired to replace her.

SUBMISSIONS

16. The Tribunal heard oral submissions from both parties with a skeleton argument for the respondent.

LAW

17. In order to terminate the contract of employment, the notification from the employer must either specify the date of termination or contain material from which it is positively ascertainable in accordance with Morton Sundour Fabrics Ltd v. Shaw [1967] 2 ITR 54. In Société Générale, London Branch v. Geys [2013] 1 AC 523 SC, the majority of the Supreme Court held that it is: "an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate" (Paragraph 57). This was applied in East London NHS Trust v. O'Connor [2020] IRLR 16 EAT. Such notice may specify that termination will occur upon the happening of a specified event: Burton Group Ltd v. Smith [1977] IRLR 351 EAT.

18. Section 98 of the Employment Rights Act 1996 provides that it is for the employer to show the reason for a dismissal (section 98(1)) and that redundancy is a potentially fair reason (section 98(2)(c))

19. Section 139(1) of ERA 1996 defines the circumstances in which an employee will be presumed to be dismissed for redundancy as follows.

> 'For the purposes of this Act an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is wholly or mainly attributable to —
>
> (a) …
>
> (b) the fact that the requirements of that business —
>
> (I) …
>
> (ii) for employees to carry out work of a particular kind in the place where the employee was employed by the employer, have ceased or diminished or are expected to cease or diminish.'

20. Whether or not dismissal for that reason is fair or unfair depends on the answer to the issue identified in section 98(4):

> "……. where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer) –
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case."

21. The ACAS Code of Practice on Discipline and Grievance does not apply to redundancy dismissals.

22. In the redundancy context, the leading case on reasonableness is Polkey v. A E Dayton Services Ltd [1988] AC 344 HL in which the House of Lords held that an employer should normally:

a. Warn and consult employees about the proposed redundancy;

b. Adopt a fair basis on which to select for redundancy. An employer must identify an appropriate pool from which to select potentially redundant employees and must select against proper criteria; and
c. Consider and, if it is available, offer suitable alternative employment within its organisation.

23. A redundancy consultation need not last for any particular length of time in order to be fair: see, for example, Hilton v. BAT Building Products (EAT/787/87), in which a consultation period of 1.5 days was held to have been fair in the circumstances.

24. In considering the search for alternative employment, the obligation on an employer is to do what a reasonable employer would do in the circumstances, and, in particular, whether what the employer did do was within the reasonable band of responses: per Burton P in Byrne v. Arvin Meritor LUS (UK) Ltd UKEAT/0239/02.

25. In Capita Hartshead Ltd v. Byard [2012] IRLR 814 Silber J at paragraph 31 gave this summary of the relevant principles in relation to the redundancy pool:

> "(a) It is not the function of the [Employment] Tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted" (per Browne-Wilkinson J in Williams v Compair Maxam Limited [1982] IRLR 83);
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> (b) …the courts were recognising that the reasonable response test was applicable to the selection of the pool from which the redundancies were to be drawn" (per Judge Reid QC in Hendy Banks City Print Limited v Fairbrother and Others (UKEAT/0691/04/TM);
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> (c) There is no legal requirement that a pool should be limited to employees doing the same or similar work. The question of how the pool should be defined is primarily a matter for the employer to determine. It would be difficult for the employee to challenge it where the employer has genuinely applied his mind [to] the problem (per Mummery J in Taymech v Ryan EAT/663/94);
>
> (d) the Employment Tribunal is entitled, if not obliged, to consider with care and scrutinise carefully the reasoning of the employer to determine if he has "genuinely applied" his mind to the issue of who should be in the pool for consideration for redundancy; and that
>
> (e) even if the employer has genuinely applied his mind to the issue of who should be in the pool for consideration for redundancy, then it will be difficult, but not impossible, for an employee to challenge it."

26. The principles in Capita Hartshead were reiterated by the EAT in Wrexham Golf Club v. Ingham UKEAT/0190/12, a case where the EAT overturned a finding of unfair dismissal which had been made on the basis that a wider pool should have been used. In doing so Judge David Richardson said:

> "The tribunal did not criticise the conclusion of the Club that the role of Club Steward should cease. Its reasoning seems to proceed from its finding that the Club did not consider developing a wider pool of employees. At this point the tribunal needed to stop and ask: given the nature of the job of Club Steward, was it reasonable for the Respondent not to consider developing a wider pool of employees? Section 98(4) requires this question to be addressed and answered.

> On its face, it would seem to be within the range of reasonable responses to focus upon the holder of the role of Club Steward without also considering the other bar staff. The tribunal does not say why it was unreasonable to do so. This may be because the tribunal had in mind the words of Mummery J in Taymech which we have quoted; but no judgment should be read as a statute. There will be cases where it is reasonable to focus upon a single employee without developing a pool or even considering the development of a pool."

27. An employer may in an appropriate case place an employee considered for redundancy in a 'pool of one', comprising only them: see, for example, Halpin v. Sandpiper Books UKEAT/0171/11.

28. Procedure is part of the overall fairness to be considered by the Tribunal and not a separate act of fairness – see Langstaff J in Sharkey v. Lloyds Bank plc UKEAT/0005//15 (4 August 2015, unreported):

> …procedure does not sit in a vacuum to be assessed separately. It is an integral part of the question whether there has been a reasonable investigation that substance and procedure run together.

29. In many cases, there will not be a single reasonable response to the circumstances that have led to the dismissal; there will be a band of reasonable responses within which one employer would reasonably take one view whereas another, equally reasonable, employer would take a different view. To put it another way, in many cases, there will be room for legitimate differences of opinion amongst reasonable employers as to what is a fair way to respond. Thus, as explained in a redundancy case, Williams v. Compair Maxam Ltd 1982 ICR 156:

> " …it is not the function of the industrial tribunal to decide whether they would have thought it fairer to act in some other way: the question is whether the dismissal lay within the range of conduct which a reasonable employer could have adopted." (p.161)

30. The Employment Appeal Tribunal in Iceland Frozen Foods Ltd v. Jones [1982] IRLR 439 summarised the way in which tribunals should approach the statutory question, saying at paragraph 24:

> "(1) The starting point should always be the words of section 57(3)[1] themselves;
> (2) In applying the section, an industrial [employment] tribunal must consider the reasonableness of the employer's conduct, not simply whether they (the members of the employment tribunal) consider the dismissal to be fair;
> (3) In judging the reasonableness of the employer's conduct, an employment tribunal must not substitute its decision as to what was the right course to adopt for that of the employer;
> (4) In many (though not all) cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view, another quite reasonably take another;
> (5) The function of the industrial [employment] tribunal, as an industrial jury, is to determine whether in the particular circumstances of each case the

[1] Said provisions of the Employment Protection (Consolidation) Act 1978 having been superseded by section 98(4) of the Employment Rights Act 1996.

decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair: if the dismissal falls outside the band, it is unfair."

DISCUSSION AND DECISION

31. There was no dispute that the claimant was dismissed or that the reason for dismissal was redundancy. The evidence of Mr Burgess which was accepted by the Tribunal established that the respondent's requirement for the work carried out by the claimant had ceased or diminished.

32. The Tribunal accepted the evidence of Mr Burgess so far as related to the sequence of events leading to the redundancy and the reasons for the claimant's selection. The Tribunal did not accept his evidence that his communications to the claimant were sufficient notice of termination.

33. The respondent adopted a fair basis on which to select for redundancy by identifying an appropriate pool of one. In this case the claimant was the only candidate in the pool because it was only her role that was redundant. Mr Burgess identified that it was the requirement for secretarial work and typing in particular, that had ceased or diminished. Since it was only the claimant who worked as a secretary and who did typing, it was only the claimant who went into the pool. The claimant was not in a job share with Ms Perkins. The claimant had been working afternoons since 2013. In the claimant's own words: Ms Perkins "cannot touch type, she cannot spell, her grammatical skills are non-existent and she does not proofread anything".

34. The claimant was a first rate touch typist and there was no complaint about her work. The evidence of the claimant was not accepted where it conflicted with the accepted evidence of Mr Burgess. It did not accept that Mr Burgess should have considered a pool of two people constituted with her and Ms Perkins but, even if he had, the claimant would still have been selected.

35. The claimant was warned and consulted about her proposed redundancy. The respondent first notified the claimant that her role was potentially redundant in a letter dated 1 June 2020. On several occasions Mr Burgess invited the claimant to meet with him in person, or to speak by phone in order to consult. Those invitations were not accepted. In the end, the claimant herself who asked for proposals to be provided in writing. Mr Burgess provided his proposals and the claimant had the opportunity to make representations to Mr Burgess about the proposed redundancy, which she did in a lengthy email. Mr Burgess responded to this email.

36. From the outset, Mr Burgess identified "no obvious vacancies". He also considered and indeed proposed that the claimant remain in her role but with shorter hours, this proposal was not accepted by the claimant.

37. Any reasonable employer could have taken the respondent's view that, in the circumstances, the claimant should be dismissed by reason of redundancy. The

Tribunal concluded that the claimant's unfair dismissal claim is not well-founded and is dismissed by the Tribunal.

38. The respondent submitted that the claimant was twice given clear and unambiguous notice that the right to terminate her employment was being exercised. The Tribunal concluded that this was not so. Mr Burgess wrote to the claimant on 1 June 2020 warning her that she was at risk of redundancy [68]. There is a heading "If you are dismissed for redundancy" and the paragraph commences "If you are ultimately dismissed with the "If" underlined. In an email of 8 June, Mr Burgess wrote at paragraph 4 "If redundancy is the answer…" Mr Burgess wrote to the claimant again on 15 June 2020. There is a heading "If redundancy is required" and the paragraph commences "If you are ultimately dismissed with the "If" underlined [78].

39. These letters were not unambiguous statements that should the consultation period end on 19 June 2020 without success, the claimant's 3 month notice period would begin to run and would end on 19 September 2020 when her employment would be terminated. At the end of the consultation period, Mr Burgess did not give written confirmation that the consultation had come to an end and give unequivocal notice of termination of employment to the claimant.

40. The claimant was entitled to 12 weeks' statutory notice under section 86 of the Employment Rights Act 1996. The claimant was entitled to notice of 12 weeks termination of employment for the period 20 September 2020 to 13 December 2020 of £3128.79. This is the amount of damages awarded to the claimant.

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Employment Judge Truscott QC
Date 9 February 2022

Sent to the parties on:
15th February 2022

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Jacqueline Tudor
For the Tribunal Office